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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW DANG WARREN,

Defendant and Appellant.

D047773

(Super. Ct. No. MH97850)

APPEAL from a judgment of the Superior Court of San Diego County,  
Christine V. Pate, Judge. Affirmed.

In December 2005, a jury found Andrew Dang Warren was a sexually violent predator within the meaning of Welfare and Institutions Code<sup>1</sup> section 6600 et. seq., the Sexually Violent Predators Act (the SVP act). Accordingly, Warren was committed to the State Department of Mental Health at Atascadero, California, to be confined there for

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<sup>1</sup> All statutory references are to the Welfare and Institutions Code unless otherwise specified.

a two-year term. Warren appeals, contending the evidence does not support the finding he is a sexually violent predator (SVP). In particular, he argues that he is not likely to commit predatory sexually violent behavior in the future. We affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

### *A. Warren's Prior Convictions*

Warren was convicted of committing two counts of lewd and lascivious acts with a child under the age of 14 in violation of Penal Code section 288, subdivision (a). He pled no contest to two counts of second degree child molestation in Rhode Island.

#### *1. Rhode Island Conviction: Child Molestation of Justin*

In 1995, Warren took a job as a live-in counselor at a group home in Rhode Island for children with certain psychological disturbances or disabilities. During his employment, Warren sodomized and orally copulated Justin, a 12-year-old male resident of the group home. Warren was 27 years old at the time.

The first incident occurred when the group's counselors were taking the children on an outing. Justin was driving with Warren when Warren returned to the group home. Warren forced Justin into Justin's bedroom where Warren pulled the boy's pants down and placed his penis into Justin's rectum. Warren then took Justin to the outing and told the other counselors that he had gotten into a traffic jam and was delayed. The second incident occurred when Warren placed his penis to Justin's mouth. Though Warren did not introduce his penis into Justin's mouth because Justin kept his mouth closed tightly, Warren's penis made contact with Justin's mouth.

Warren was charged, and placed on bail. He then moved to California. Following Warren's California conviction (see below), Warren was transferred back to Rhode Island where he pled no contest to two counts of second degree child molestation. He was sentenced to three years in prison to be served concurrently with his California term. Thereafter, Warren was returned to California to complete his sentence.

## *2. California Conviction: Child Molestation of Michael M.*

In 1998, Warren volunteered to baby-sit four-year-old Michael M., and two other children. While the children were staying at Warren's house, Warren digitally penetrated Michael's rectum -- he put his finger inside the victim's anus. Warren also had Michael orally copulate him. Warren used a scary movie, *Nightmare of Elm Street*, to scare the boy into doing what he wanted. Warren knew that Michael was afraid of the dark and threatened the boy that if he did not cooperate, Warren would put him in a dark room.

Warren pled guilty to two counts of lewd and lascivious acts with a child under the age of 14, and was sentenced to eight years in state prison.

## *B. Procedural Background*

Prior to Warren's release from prison, the San Diego County District Attorney filed a petition, alleging Warren was a SVP under the provisions of the SVP act. At trial, the district attorney presented expert testimony from two psychologists, Dr. John Hupka and Dr. Bruce Yanofsky. Both psychologists were members of the Department of Mental Health panel of evaluators for sexually violent predators. Both psychologists reviewed Warren's prison file, which included probation officer's reports, legal documents, and information about his behavior in the institution. Dr. Hupka and Dr. Yanofsky also

reviewed Warren's medical records that contained three prior psychological evaluations. Warren declined Dr. Hupka and Dr. Yanofsky's interview requests for the purpose of a psychological assessment.

Dr. Hupka and Dr. Yanofsky testified regarding the Rhode Island conviction and the California conviction. They also provided testimony about another incident involving Dylan, another 4-year-old boy Warren had babysat. Warren played a licking game with Dylan in which the child licked Warren's penis and anus, and Warren would lick the boy's penis and anus. In addition, Dr. Hupka and Dr. Yanofsky testified concerning a list of child pornography websites and children's toys that were found in Warren's apartment.

Dr. Hupka testified that Warren "meets the criteria for a diagnosis of pedophilia . . . [which] involves recurrent and sexually-arousing fantasies, urges or behaviors . . . [a]nd we see that in his behavior history. We see that in his offense history, both the offense in Rhode Island and the subsequent offense behaviors in California. We also see it in his use of child pornography." Dr. Hupka testified that "it's not unusual for individuals who suffer from pedophilia to seek out work in which they can place themselves in a position of having access to children. And Mr. Warren has done that with his work in the group homes in the state of Rhode Island, and with babysitting here in California." Warren's behavior is predatory -- he "has not been able to control his behavior when it comes to sex with children. To the contrary, he appears to go out of his way to obtain boys to molest." Furthermore, Dr. Hupka testified that "[n]ot only has [Warren] done it in the past, not only does he have a mental disorder that makes him inclined to do these things, . . . he is at high risk" to re-offend in the future.

Dr. Yanofsky also diagnosed Warren with "pedophilia, sexual[] attract[ion] to [adolescent] males." He testified that Warren had recurrent, intense sexually arousing fantasies, sexual behaviors involving sexual activity with prepubescent children; that Warren acted on these sexual urges or fantasies as established by his criminal record; and that Warren has a predisposition to commit such offenses. "Warren had committed an offense in Rhode Island, posted bail and was obviously on conditional release. Somehow he managed to leave Rhode Island and come to California. And in spite of being under those situations which is obviously a legal procedure, he is on bail, conditional release, he still reoffended." Further, Dr. Yanofsky concluded that Warren is "absolutely" likely to engage in sexually violent predatory criminal behavior. "Warren's actions were predatory in nature . . . . [I]n all three instances that are known to us, Mr. Warren engaged the victims in specific ways to take advantage of them. He developed a relationship with the specific intent and purpose to eventually abuse them.

Warren denied committing the sexual offenses in Rhode Island and California, and claimed he entered into plea agreements to obtain a more lenient sentence. Warren denied that the list of child pornography websites were in his handwriting and claimed he did not know how the list got into his apartment. Warren also presented the expert testimony of Dr. Theodore Donaldson, the psychologist who interviewed and evaluated Warren.

Dr. Donaldson opined that there was insufficient evidence to determine that Warren was a pedophile. He testified that he was unable to diagnosis Warren because (1) he is unsure of whether pedophilia exists and (2) in his best hypothesis, Warren's

behavior was opportunistic. Dr. Donaldson also stated that Warren's behavior of placing himself in a group home and volunteering to babysit led to his uncertainty as to diagnosis. "I don't know, but that was a red flag, . . . one of the things that I saw is a tendency for some fixation on children. I don't know if that's what it really is or not, but there's some evidence for that. And that was one of the things that caused some uncertainty in my opinion."

## DISCUSSION

On December 13, 2005, the jury unanimously found Warren to be a SVP. Accordingly, the court ordered Warren committed to Atascadero State Hospital for a period of two years.

In an argument that views the record in the light most favorable to his own position, Warren contends the evidence is insufficient to support the finding he is a SVP. Warren does not challenge the sufficiency of the evidence to prove he was convicted of two separate sexually violent offenses or that he has a diagnosable mental disorder that makes him a danger to the health and safety of others. (*People v. Fulcher* (2006) 136 Cal.App.4th 41, 52.) Warren contends there is not sufficient evidence in the record to demonstrate his disorder makes it likely he will engage in sexually violent conduct if released or that his sexually violent criminal conduct will be predatory in nature. After a review of the record, we are satisfied there is sufficient evidence to support the finding and resulting commitment of Warren as a SVP.

When we review a jury determination that a person is a SVP we apply the familiar substantial evidence standard of review. Under that standard, we review the entire record

in the light most favorable to the jury's finding. We draw all reasonable inferences in favor of the jury verdict, and we do not make credibility determinations. The decision as to which evidence should be believed and the weight to which it is entitled is for the jury to determine. We merely determine if there is sufficient substantial evidence in the record from which a reasonable jury could make such decision. (*People v. Mercer* (1999) 70 Cal.App.4th 463, 466-467; *People v. Poe* (1999) 74 Cal.App.4th 826, 830.)

As we have discussed previously, two mental health experts reviewed Warren's history and determined his prior conduct had been predatory and that he is likely to commit such acts in the future if he is released. Warren refused to be interviewed by the experts called by the prosecution, but did agree to be interviewed by the defense expert. The weight to be given to the opinions of the experts was for the jury to decide. The material considered by the prosecution experts was sufficient to support their opinions.

Warren argues that the prosecution experts' opinions were not entitled to any weight because his past crimes, which they considered, were not predatory in nature, but were merely opportunistic. The jury was not required to accept Warren's interpretation of his past acts. Even the defense expert expressed the view that the record "looks bad" for Warren. Warren had placed himself in an employment situation in Rhode Island where children were available. Warren had been cautioned about his inappropriate attention to the 12-year-old victim in that case, yet he continued that attention and was able to victimize that child.

When he moved to California, Warren again placed himself in a position to take advantage of vulnerable children. Both prosecution experts found Warren to be a

pedophile and that his acts were predatory. The defense expert found the record confusing and insufficient for him to diagnose Warren as a pedophile.

An offense is predatory within the meaning of the SVP Act as defined in section 6600, subdivision (c), which states: " 'Predatory' means an act is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or individual with whom a relationship has been established or promoted for the primary purpose of victimization."

Reasonable mental health experts could find Warren's past sexual offenses were predatory. Likewise, a reasonable jury could find adequate support for the experts' opinions. That Warren can conjure up a different explanation, or that his expert finds the record "confusing" does not demonstrate insufficiency of the evidence. It merely illustrates there could be different interpretations of the facts. When one draws all reasonable inferences in favor of the jury's decision, it is clear the verdict finding Warren a SVP is supported by substantial evidence.



DISPOSITION

The judgment is affirmed.

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HUFFMAN, Acting P. J.

WE CONCUR:

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HALLER, J.

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IRION, J.